Integrated Training and Services Sdn Bhd v Kerajaan Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 01(f)-29–09 OF 2020(W)
TENGKU MAIMUN CHIEF JUSTICE, NALLINI PATHMANATHAN AND ZALEHA YUSOF FCJJ
28 MARCH 2022

Contract — Damages — Assessment — Expert determination clause — Parties to contract agreed to be bound by damages determined by independent auditor mutually appointed by them in event of breach — Respondents subsequently disagreed with methodology adopted by auditor to determine damages and sought court order to set aside his assessment and to cross-examine him — Evidence showed respondents had agreed at assessment hearing to be bound by auditor's determination and had made no application to court to cross-examine him before award was made — Whether respondents were bound by auditor's determination of the damages absent any vitiating factors — Whether since there were no prescribed procedures or terms of reference that auditor had to follow, the law allowed him to use his own methodology to determine the damages payable — Whether so long as auditor had acted honestly and in good faith within his contractual mandate his decision could not be vitiated

The appellant had a written contract with the first respondent ('R1') under which cl 27.4 provided that if the contract was terminated under cl 27.3, R1 would pay the appellant upon demand the amount 'determined by an independent auditor appointed mutually by both parties in respect of all sums and expenses properly and necessarily incurred by the contractor (ie, the appellant)'. The High Court found that the respondents had breached the contract and allowed the appellant's claim for special damages. The Court of Appeal ('COA') set aside the award of damages and remitted the case back to the High Court for the registrar to assess the damages in accordance with cl 27.4 ('the 2015 order'). Pursuant to the COA's decision, the parties appointed a chartered accountant ('the auditor') to determine the damages. The auditor's report, assessing damages at RM21,735,613.50, was accepted by the registrar who awarded the appellant damages for that sum. The judge in chambers ('JC') allowed the respondents' appeal against the registrar's decision and directed the parties to appoint a new auditor to re-assess the damages. The judge held that since the respondents did not agree with the report, the auditor should have clearly explained his decision in open court. The judge also held that cl 27.4 did not say that the auditor's report had to be accepted as final and conclusive. The appellant appealed but the COA dismissed the appeal and affirmed the JC's decision ('the 2018 Order'). In the instant appeal against the

2018 Order, the appellant submitted that since there were no vitiating factors, such as fraud, collusion, partiality or being contrary to public policy, affecting the auditor's decision, his determination of the amount of damages payable was binding on the parties. The respondents, on the other hand, contended that the auditor had considered irrelevant material in coming to his decision and urged the court to order that the auditor be cross-examined on his report.

Held, unanimously allowing the appeal, setting aside the 2018 Order and the JC's decision; and reinstating the damages awarded by the registrar:

(1) Clause 27.4 required the parties to mutually appoint an independent auditor to determine the amount of damages payable to the appellant. The parties were bound by that agreement. Hence, the COA's 2015 order read with cl 27.4 required the registrar to assess the damages in accordance with the determination made by the independent auditor (see paras 19 & 26).

(2) The respondents' main grievance was that they were not given a chance to cross-examine the expert. But the evidence showed otherwise. The respondents had the opportunity to question the expert during clarification and, in fact, at one of the meetings held on 11 April 2016, counsel for the respondents said that she left it to the expert to determine the amount. If the respondents were serious about cross-examining the expert, they should have taken steps under O 37 r 4 of the Rules of Court 2012 to apply to cross-examine the expert, but they did not do so. Now, the respondents urge this court to order that they be allowed to cross-examine the expert. But how could such a request now be made when the 2018 Order was for a new auditor to be appointed and the respondents did not appeal against that decision? (see para 27).

(3) Once the parties had agreed to the mutually-appointed expert, they were bound by the expert's determination. The court would not generally intervene in a matter which was within the jurisdiction of the expert save in the narrow circumstances where vitiating factors such as fraud, collusion or partiality/bias could be shown. No vitiating factor was shown in the instant appeal. The respondents did not allege that the expert was not honest in preparing his report. Even if the expert had considered irrelevant documents in preparing his report, that was not a vitiating factor or ground to unravel the agreement (see para 28).

(4) The mere fact that the respondents were unhappy with the methodology used by the expert could not be a reason to set aside the expert's determination. The respondents had not adduced any evidence to show that the expert had transcended the limits of his engagement (see para 29).

(5) Clause 27.4 did not prescribe the procedures to be followed by the expert. There was also no terms of reference given to the expert. Hence, under the law, the expert was free to determine the procedures. Even if a new auditor was appointed, as ordered by the 2018 Order, there was no guarantee that the respondents would be happy with the methodology that would be used by the new auditor. There would not be an end to this (see paras 30–31).

[Bahasa Malaysia summary

Perayu mempunyai kontrak bertulis dengan responden pertama ('R1') di mana klausa 27.4 memperuntukkan bahawa sekiranya kontrak tersebut ditamatkan di bawah klausa 27.3, R1 akan membayar perayu apabila dituntut amaun 'ditentukan oleh juruaudit bebas yang dilantik bersama oleh kedua-dua pihak. berkenaan dengan semua jumlah dan perbelanjaan yang sepatutnya dan semestinya ditanggung oleh kontraktor (iaitu, perayu)'. Mahkamah Tinggi mendapati bahawa responden telah melanggar kontrak dan membenarkan tuntutan perayu untuk ganti rugi khas. Mahkamah Rayuan ('MR') mengetepikan award ganti rugi dan menghantar semula kes tersebut ke Mahkamah Tinggi bagi pendaftar untuk menaksir ganti rugi mengikut klausa 27.4 ('Perintah 2015'). Menurut keputusan MR, pihak-pihak melantik akauntan bertauliah ('juruaudit') untuk menentukan ganti rugi. Laporan juruaudit, menaksie ganti rugi sebanyak RM21,735,613.50, telah diterima oleh pendaftar yang memberikan ganti rugi kepada perayu untuk jumlah tersebut. Hakim dalam kamar ('HDK') membenarkan rayuan responden terhadap keputusan pendaftar dan mengarahkan pihak-pihak melantik juruaudit baharu untuk menaksir semula ganti rugi. Hakim memutuskan bahawa oleh kerana responden tidak bersetuju dengan laporan tersebut, juruaudit sepatutnya menjelaskan dengan jelas laporaanya di mahkamah terbuka. Hakim juga memutuskan bahawa klausa 27.4 tidak mengatakan bahawa laporan juruaudit perlu diterima sebagai muktamad dan konklusif. Perayu merayu namum MR menolak rayuan dan mengekalkan keputusan HDK ('Perintah 2018'). Dalam rayuan semasa terhadap Perintah 2018, perayu berhujah bahawa memandangkan tiada faktor penolakan, seperti frod, pakatan sulit, pilih kasih atau bertentangan dengan dasar awam, yang menjejaskan keputusan juruaudit, taksiran amaun ganti rugi yang perlu dibayar adalah terikat pada pihak-pihak. Responden, sebaliknya, berpendapat bahawa juruaudit telah mempertimbangkan material yang tidak relevan dalam membuat keputusannya dan menggesa mahkamah memerintahkan supaya juruaudit diperiksa balas terhadap laporannya.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan Perintah 2018 dan keputusan HDK dan mengembalikan semula ganti rugi yang diberikan oleh pendaftar:

(1) Klausa 27.4 memerlukan pihak-pihak untuk sama-sama melantik

juruaudit bebas untuk menentukan jumlah ganti rugi yang perlu dibayar kepada perayu. Pihak-pihak terikat dengan perjanjian tersebut. Oleh itu, perintah MR 2015 yang dibaca dengan klausa 27.4 memerlukan pendaftar untuk menaksirkan ganti rugi mengikut penentuan yang dibuat oleh juruaudit bebas (lihat perenggan 19 & 26).

(2) Keluhan utama responden adalah mereka tidak diberi peluang untuk menyoal balas pakar tersebut. Tetapi keterangan menunjukkan sebaliknya. Responden berpeluang untuk menyoal pakar semasa klarifikasi dan, sebenarnya, pada salah satu mesyuarat yang diadakan pada 11 April 2016, peguam bagi responden mengatakan bahawa beliau menyerahkan kepada pakar untuk menentukan jumlahnya. Sekiranya responden serius untuk menyoal balas pakar, mereka sepatutnya mengambil langkah di bawah A 37 k 4 Kaedah-Kaedah Mahkamah 2012 untuk memohon untuk memeriksa balas pakar, tetapi mereka tidak berbuat demikian. Kini, responden menggesa mahkamah ini untuk memerintahkan supaya mereka dibenarkan menyoal balas pakar tersebut. Tetapi bagaimana permohonan sedemikian boleh dibuat sekarang apabila Perintah 2018 adalah untuk juruaudit baharu dilantik dan responden tidak membuat rayuan terhadap keputusan tersebut? (lihat perenggan 27).

(3) Apabila pihak-pihak telah bersetuju dengan pakar yang dilantik bersama, mereka terikat dengan dapatan pakar. Mahkamah secara amnya tidak akan campur tangan dalam perkara yang berada dalam bidang kuasa pakar kecuali dalam keadaan kecil di mana faktor-faktor yang menghalang seperti frod, pakatan sulit atau pilih kasih/berat sebelah boleh ditunjukkan. Tiada faktor penolakan ditunjukkan dalam rayuan semasa. Responden tidak mendakwa pakar tersebut tidak jujur dalam menyediakan laporannya. Walaupun pakar telah mempertimbangkan dokumen yang tidak relevan dalam menyediakan laporannya, itu bukanlah faktor atau alasan untuk membongkar perjanjian (lihat perenggan 28).

(4) Fakta bahawa responden tidak berpuas hati dengan metodologi yang digunakan oleh pakar tidak boleh menjadi alasan untuk mengenepikan dapatan pakar. Responden tidak mengemukakan sebarang keterangan untuk menunjukkan bahawa pakar telah melampaui had penglibatannya (lihat perenggan 29).

(5) Klausa 27.4 tidak menetapkan prosedur yang perlu diikuti oleh pakar. Juga tiada terma rujukan diberikan kepada pakar. Oleh itu, di bawah undang-undang, pakar bebas menentukan prosedur. Walaupun juruaudit baharu dilantik, seperti yang diarahkan oleh Perintah 2018, tidak ada jaminan bahawa responden akan gembira dengan metodologi yang akan digunakan oleh juruaudit baharu. Ia tiada pengakhiran pada hal ini (lihat perenggan 30–31).]

Cases referred to

Barclays Bank plc v Nylon Capital LLP [2011] EWCA Civ 826, CA (refd)
CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1, FC (refd)
Campbell v Edwards [1976] 1 All ER 785, CA (refd)
Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors [2021] 2 MLJ 374; [2021] 3 CLJ 159, FC (refd)
Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors [2011] 6 MLJ 585; [2011] 8 CLJ 141, CA (refd)
Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256 [2007] 1 SLR 1004, HC (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn & Ors [1976] 2 MLJ 93, PC (refd)
The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646, SC (refd)
Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301; [2017] 2 CLJ 32, FC (refd)

Legislation referred to

Contracts Act 1950 s 74
Rules of Court 2012 O 37 rr 1, 4

Appeal from: Civil Appeal No W-01(1M)(NCVC)-235–07 of 2017 (Court of Appeal, Putrajaya)

Malik Imtiaz (Afifi Ahmad and Wong Ming Yen with him) (Azrul Afifi & Azuan) for the appellant.
Habibah bt Haron (Narian Hasanah Othman with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Zaleha Yusof FCJ:

BACKGROUND FACTS

[1] This appeal arose from an assessment of damages proceeding, the decision of which entails a question as to whether a court may lawfully depart from what has been agreed by the parties in their contract to have a mutually appointed expert to determine expenses or damages as a means of independent valuation.

[2] The appellant is a company operating a flight academy which conducts flight training, flight simulator training and aircraft rental.

[3] At the request of the respondents, the appellant and the first respondent entered into two agreements which, inter alia, required the appellant to provide and carry out flight training courses for the respondents' trainees and the

respondents were to send a certain number of trainees to attend the appellant's training courses by batches. The respondents failed to send the required number of trainees as agreed. As a result, the appellant was forced to end the training courses early as it could not afford to bear the cost due to the insufficient numbers.

[4] Subsequently, the appellant sued the respondents at the High Court for breach of contract. The High Court found for the appellant and allowed the appellant's claim for special damages in part. On appeal, the Court of Appeal on 12 May 2015 found that the High Court was correct in finding the respondents liable for breach of contract. However, the Court of Appeal set aside the amount of damages and remitted the matter to the High Court for assessment of damages before the registrar in accordance with cl 27.4 of the contract. The exact wordings of the relevant paragraph of the said order dated 12 May 2015 ('2015 Order'), inter alia, are as follows:

> (c) Berkenaan item (1) dalam Penyataan Tuntutan Plaintiff; perintah mahkamah atas kuantum diketepikan dan digantikan dengan Perintah *bahawa kes diremit ke Mahkamah Tinggi untuk taksiran ganti rugi di hadapan Pendaftar Mahkamah Tinggi selaras dengan Klausa 27.4 Kontrak;* ... (Emphasis added.)

[5] Pursuant to the order, parties agreed for a chartered accountant Messrs Salihin to be appointed as an independent auditor. A report was prepared by Messrs Salihin and produced before the deputy registrar of the High Court wherein damages was assessed in the sum of RM21,735,613.50. The deputy registrar accepted the report and awarded damages to be paid to the appellant in that sum.

[6] Aggrieved, the respondents appealed to the judge in chambers, the learned judicial commissioner (JC), and the learned JC allowed their appeal and directed that parties appoint a new auditor to assess the damages payable in accordance with cl 27.4. The learned JC was of the view that the said cl 27.4 did not state that the report of the expert must be accepted as final and conclusive. The learned JC opined that it was important for the expert to give clear explanation in open court as the respondents did not agree with the report.

[7] Dissatisfied with the learned JC's decision, the appellant appealed to the Court of Appeal. The Court of Appeal on 13 March 2018 affirmed the decision of the High Court and dismissed the appellant's appeal ('2018 Order'). The Court of Appeal was of the view that s 74 of the Contracts Act requires the expert to justify this report to ensure that it was fair and transparent.

[8] On 15 September 2002, this court granted the appellant's application for leave to appeal on the following questions of law:

A (a) whether s 74, Contracts Act 1950 applies to where parties to a contract have agreed to be bound by the determination of a mutually appointed expert as to the amount due and payable under a contract by reason of a breach or other specified event ('question 1');

B (b) whether in the absence of any vitiating factors recognised in law, a report of the said mutually appointed expert determining such amount would be sufficient basis in law and fact for an award of damages in proceedings for the assessment of such amount ('question 2'); and

C (c) whether such a report is only to be rejected where it is established that the report is unreliable within the meaning of the decision of the Privy Council in *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn & Ors* [1976] 2 MLJ 93 (PC) ('question 3')

D THE APPELLANT'S SUBMISSION

[9] Dato Malik Imtiaz, learned counsel for the appellant submitted that when parties to a contract have agreed to be bound by the assessment of a mutually appointed expert, they are not entitled to reject the conclusions E arrived at by the expert save in very limited circumstances. In this appeal, the contracts entered into by the parties contained cl 27.4, which is an expert determination clause wherein parties have agreed to appoint an independent auditor to determine the amount payable in the circumstances contemplated by the clause. Therefore, learned counsel for the appellant contended that the F determination of the Auditor is final and parties are bound by it; unless there are vitiating factors such as fraud, collusion and partiality or against public policy.

[10] There was however, no evidence of any vitiating factors. Although the G respondents during a case management said they wanted to cross-examine the expert, no such application was made to court under O 37 r 1 of the Rules of Court 2012. In fact, when the matter went for clarification before the registrar on 16 July 2016, senior federal counsel for the respondents was fully involved in the proceeding; and even said that she left it to Encik Salihin, the expert. At H no time during clarification did the respondent raise fraud, bias etc. They agreed that the question of expertise be left with the expert but they were not happy with the methodology adopted by the expert.

[11] Learned counsel for the appellant averred that since cl 27.4 does not I specify the methods to be taken, it is up to the expert to decide. The expert had considered all relevant matters before arriving at the figure in accordance with the contract and in line with the Court of Appeal's order.

[12] Learned counsel for the appellant also brought to this court's attention

an attempt by the respondent to include s 74 of the Contracts Act in the draft order but was refused by the registrar of the Court of Appeal. This act was an attempt to rewrite the order of the Court of Appeal which states 'selaras dengan Klausa 27.4 Kontrak'.

[13] To support his oral argument before us, learned counsel for the appellant had referred to various authorities; inter alia, *Kendall on Expert Determination* (5th Ed, Sweet & Maxwell South Asian Edition, 2018); *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256* [2007] 1 SLR 1004; *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301; [2017] 2 CLJ 32 and *Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors* [2011] 6 MLJ 585; [2011] 8 CLJ 141.

[14] In his submission, learned counsel for the appellant argued that question 1 be answered in the negative while questions 2 and 3 to be answered in the affirmative.

THE RESPONDENTS' SUBMISSION

[15] Puan Habibah, learned senior federal counsel (SFC) in her submission admitted that the respondents agreed with the auditor's appointment but the respondents did not agree on how the amount was derived by the auditor. She averred that the respondent had informed the registrar during a case management that they wished to cross-examine the auditor but the registrar proceeded with the clarification on the next date.

[16] She contended that the auditor's determination can still be challenged as the said cl 27.4 does not state 'final and conclusive'. She further submitted that *Geowin*, can be distinguished as in *Geowin*, there was a finality clause.

[17] She further submitted that the auditor had failed to follow the principle of assessment, and that the vitiating factor is present as the auditor had considered irrelevant document and this cause miscarriage of justice. She admitted there was no terms of reference (TOR) given to the auditor upon his appointment and that she had no authority or case law to support her argument. She repeated that the respondents just wanted to cross-examine the auditor and urged this court to make a new order to the effect.

OUR DECISION

[18] We were of the view that the 2015 Order was clear and straight forward that the case was ordered to be remitted to the High Court for assessment of

damages before the registrar of the High Court and the assessment had to be in line with cl 27.4 of the contracts entered into by the parties. To better understand its context, the said cl 27.4 is reproduced below:

> 27.4 In the event that this Contract is terminated under any provision of Clause 27.3, the Government shall pay the Contractor upon demand *the amount of which to be determined by an independent auditor to be appointed mutually by both Parties in respect of all sums and expenses properly and necessarily incurred by the Contractor* in accenting it to obligation under this Contract up to and including the date of termination of this Contract. (Emphasis added.)

[19] Clause 27.4 requires the parties in this contract to mutually appoint an independent auditor to determine the amount due and payable to the contractor. Hence, when the 2015 Order is read with cl 27.4, it requires the registrar to assess the damages in accordance with the determination made by the said independent auditor.

[20] Clause 27.4 is not uncommon. It is called 'Expert Determination Clause'. The Supreme Court of New South Wales in *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 explained that expert determination is a process where an independent expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the expert. Expert determination provides an informal, speedy and effective way of resolving disputes particularly disputes which are of a specific technical character or specialized kind. So, the purpose of having such a clause in a contract is to assist parties resolving disputes without delay and expenses of going to court or arbitration; as by contract the parties agree to be bound by the decision of the expert.

[21] The expert determination clause in the parties' contract may specify the procedure to be followed, but where the contract does not specify the procedure, the procedure will be decided by the expert. See *Kendell on Expert Determination*.

[22] In *Campbell v Edwards* [1976] 1 All ER 785 it was held, inter alia, where two parties had agreed that the price of the property was to be fixed by a valuer on whom they should agree and the valuer gave his valuation honestly and in good faith in a non-speaking report, ie one that did not give reasons or calculations, the valuation could not be set aside by either party on the ground that the valuer had made a mistake, for, in the absence of fraud or collusion, the valuation was binding on the parties by contract. Lord Denming MR at p 788 had stated the following:

> ... It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly

and in good faith, they are bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything.

[23] In *Campbell v Edwards*, there was a challenge to a surveyor's decision on the surrender value of the lease. The surveyor was appointed by the parties under the lease pursuant to a letter which read: 'It has been agreed between the parties to instruct yourselves to assess the proper price for the surrender in accordance with the provisions of the Lease'. The tenant subsequently discovered that the valuation by the surveyor should have been much lower. The English Court of Appeal dismissed the tenant's appeal and held that parties were bound by the honest valuation fixed by the agreed appointed valuer.

[24] The decision of *Campbell v Edwards*, was followed by Singapore High Court in *Geowin Construction*. It was, inter alia, held that:

if two persons agreed for a valuation to be made by an expert, even if that expert made a mistake, the parties were still bound by the decision of the expert so long as this was given honestly and in good faith. An expert's decision could be set aside on the basis of fraud or partially. Beyond that, it was probably correct to say that only a breach of an expert's term of appointment would suggest to set aside his decision. Errors of fact or law would not vitiate an award of the expert acted within his contractual mandate.

[25] The decision of *Campbell v Edwards*, had also been referred to with approval by our Court of Appeal in *Folin*'s case, and *Zen Courts Sdn Bhd*.

[26] Coming back to the appeal before us, there was no denial on the part of the respondents that they had agreed to the appointment of the independent auditor to assess the amount due and payable to the appellant. This agreement to refer the matter for expert determination is a contract that can be enforced according to their terms. In any written agreement there must be strict adherence to the agreed terms of the agreement by the parties. See the decision of this court in *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] 2 MLJ 374; [2021] 3 CLJ 159. Parties are free to enter into contract; hence, they are bound by it. This principle had been reiterated by this court in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 as follows:

[26] We agree with the defendant that parties are bound by the terms of the contract which they entered into and that it is the court's duty to give effect to the clear and plain meaning of the words in the said clause. That is quite trite.

[27] *The law recognises the principles of freedom of contract. Parties to a contract are free to determine for themselves what their obligations are*. As Sir George Jessel MR said in *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465:

men of full age and competent understanding shall have the utmost liberty of

A contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract. (Emphasis added.)

B **[27]** The respondents' main grievance was that they were not given a chance to cross-examine the expert. But the evidence showed otherwise. The SFC had the opportunity to question the expert during clarification and in fact at one of the meetings held on 11 April 2016 the SFC had said that she left it to the C expert to determine the amount (*serahkan kepada Encik Salihin untuk tentukan jumlah*). If the respondents were serious about cross examining the expert, they should have taken steps under O 37 r 4 of the Rules of Court 2012 to apply to the court to cross-examine the expert. This was not done. Now before us, the learned SFC urged this court to make an order for the respondents be allowed D to cross-examine the expert. With due respect to learned SFC, the 2018 Order was for a new auditor to be appointed. The respondent did not file an appeal against this decision. The appeal before us was by the appellant. So, how could this court be urged to make such an order to cross-examine the expert? When asked by this court, learned SFC again admitted that she had no authority or E case law to support her argument.

[28] The law is trite. Once parties have agreed to the mutually appointed expert, parties are bound by the expert's determination. The court will not generally intervene in a matter which is within the jurisdiction of the expert F save in the narrow circumstances where vitiating factor such as fraud, collusion or partially/bias can be shown. See also the English Court of Appeal in *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826. We found there was no vitiating factor shown in this appeal. The respondents did not allege that the expert was not honest in preparing the report. Even if it was true that the expert G had taken into consideration irrelevant documents in preparing his report, that is not a vitiating factor or a ground to unravel the agreement as shown by previous authorities such as *Campbell v Edwards*.

H **[29]** The mere fact that the respondents were not happy with the methodology used by the expert cannot be a reason to set aside the expert's determination. The respondents had also not adduced any evidence to show that the expert had transcended the limits of his engagement.

I **[30]** Clause 27.4 does not provide the procedures to be followed by the expert. There was also no TOR given to the expert. Hence under the law, the expert is free to determine the procedures.

[31] Further, it was our opinion, even the appointment of a new auditor as ordered in the 2018 Order will not guarantee that the respondents will be happy with the methodology taken by the new auditor. There will not be an end to this.

CONCLUSION

[32] Based on the above, we found merits in this appeal. However, we were of the view, it was not necessary for this court to answer the questions posed.

[33] We therefore allowed the appeal. The 2018 Order of the Court of Appeal and the High Court order dated 16 June 2017 were set aside. We reinstated the award by the registrar delivered on 2 September 2016 with costs of RM60,000 here and below to the appellant subject to allocator.

Appeal allowed, 2018 order and the JC's decision set aside; and damages awarded by the registrar reinstated.

Reported by Ashok Kumar